

IN THE
Supreme Court of the United States

Supreme Court, U. S.

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October Term, 1977

No. 77-303

**THOMAS J. PALMER, INC., LAKE CONSTRUCTION CO.,
INC., KENNETH G. WALKER and THOMAS J. PALMER,**
Petitioners,

vs.

**CROCKER NATIONAL BANK and SUPERIOR COURT OF
THE STATE OF CALIFORNIA FOR THE COUNTY OF
LOS ANGELES,**

Respondents.

**Reply Brief of Petitioners to Respondent's Brief in
Opposition to Petition for a Writ of Certiorari.**

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Statutory Authority.

Rule 24(4) of the Rules of the Supreme Court provide that a petitioner who has filed a petition for a writ of certiorari may submit a reply brief addressed to arguments first raised in the brief in opposition. This reply brief is being filed in accordance with rule 24(4).

Statement.

Respondent's brief in opposition is a remarkable exercise in self-serving rhetoric. Simply stated, it presents the position of an understandably biased advocate and generally concerns itself with matters not before this Honorable Court.

For example, there is a discussion pertaining to the subsequent actions filed by petitioners in the Central District and then the Northern District of California which is replete with erroneous conclusions not supported by any record. However, it is not necessary to delve into those matters herein as they are far beyond the record before this court and have no bearing on the instant petition for a writ of certiorari.

Respondent complains at page 2 of its brief in opposition that petitioners have failed to supply it with information to allow it to refuse to pay the letter of credit. Crocker needs only to examine the complaint on file which is filled with allegations of wrongdoing and of a tortious conspiracy. In fact, Crocker refers to the complaint at page 6 of its own brief. Additionally Crocker is well aware that petitioners assert that the letter of credit had expired on December 31, 1976. Regardless of these inconsistencies, it is all beyond the record before this court.

Respondent indicates that there is serious doubt as to whether California has jurisdiction over the Turkish Bank. While this, too, is not before this court, it is petitioners' position that California does, indeed, have jurisdiction over the Turkish Bank. In this regard, the order of the Superior Court granting the motion of the Turkish Bank to quash service of summons was based upon the manner of service, not upon the question of jurisdiction which has not yet been decided.

Respondent then asserts that California Commercial Code, Sections 5409 and 5414 required it to honor the Turkish Bank's demand. Petitioners, however, have a different view of Sections 5409 and 5414. Nevertheless, the effect of the California Commercial Code

has not been decided by a California court in this case, is not an issue before this court and, further, does not contain any provision which precludes injunctive relief.

It is then interesting to note that respondent delineates, at page 17 of its brief in opposition, a particular time sequence with regard to the order issued by the Honorable Justice William H. Rehnquist on October 24, 1977, in which respondent states that, "At approximately 10 A.M. Crocker's counsel notified petitioners' Washington counsel that Crocker would make payment immediately. At 11:57 A.M., Crocker honored Turkish Bank's demand. At approximately 2:00 P.M., Crocker's counsel received notice that, at approximately 1:30 P.M., a stay had issued and would remain in effect pending Crocker's response to the application." On the one hand, petitioners understand this presentation as being that of an advocate, but, on the other hand, petitioners object to the manner of presentation which omits certain material facts.

The time sequence should include that at approximately 9:30 A.M.,¹ petitioners' California counsel advised respondent's California counsel that it would be seeking a "stay order" from Justice Rehnquist and would be associating Washington counsel. Respondent's California counsel asked for the identity of the Washington counsel in order to have its own counsel contact them and perhaps join in an appearance before Justice Rehnquist. This courtesy was, of course, extended. Thus, respondent had full knowledge that petitioners were seeking an order and were afforded the opportunity to present opposition.

¹All times are Pacific Daylight Time, October 24, 1977.

Despite this knowledge, shortly after noon, respondent's California counsel advised petitioners' California counsel that Crocker had paid the letter of credit at 11:57 A.M. At approximately 1:30 P.M., petitioners' California counsel learned that Justice Rehnquist had issued an order staying the order of the California Court of Appeal, and shortly thereafter, petitioners' counsel so advised respondent's counsel.

It must be noted, as it is of considerable significance, that when it is noon in California, the approximate time that Crocker alleges it paid the letter of credit, it is 10:00 P.M. in Turkey, hardly a business hour. Thus, there is a considerable question as to whether Crocker's payment had, in fact, culminated at 11:57 A.M. or whether Crocker had ample opportunity to cancel or reverse what it had done so as to comply with the order of Justice Rehnquist. Thus, there is a substantial issue as to whether payment had actually been made or the payment process had been completed before Crocker received notice of the order of this Court. It will be interesting to ascertain just what mischief has been occasioned by Crocker's precipitous conduct.

ARGUMENT.

I.

The Question as to Whether 12 U.S.C. 91 Immunizes a National Bank From Responsibility for Knowingly Aiding and Abetting Others in the Violation of a Preliminary Injunction Issued Prior to Final Judgment Remains a Viable Issue.

As may be gleaned from the petition for writ of certiorari, the order of the California Court of Appeal vacating the Superior Court injunction was as to Crocker only and did not effect the injunction as to the remaining defendants.

Respondent cursorily states in a footnote at page 4 of its brief in opposition that "The petition purports to present a second question—whether 12 U.S.C. Section 91 immunizes a national bank from responsibility for knowingly aiding or abetting others in the violation of a preliminary injunction issued prior to final judgment." Respondent then cites *California v. Taylor*, 353 U.S. 553, 557 n.2 (1957) for the proposition that this question is not properly before this court. Such a conclusion is wholly erroneous. In the footnote of the *Taylor* case cited by Crocker, the Supreme Court states, "The Court of Appeals, however, held that this contention had been waived. . . ." No such holding of waiver was made by a California court in the instant action. Further, and of considerable importance, the issue did not arise until the California Court of Appeal issued its order vacating the injunction as to Crocker. It is that order to which this petition is directed and it is that order which created this particular issue. One cannot be deemed to have waived an issue which did not yet exist.

II.

The Petition for Writ of Certiorari Is Not Moot.

On October 24, 1977, the Honorable William H. Rehnquist issued an order which had the effect of reinstating the injunction against Crocker issued by the California Superior Court for the County of Los Angeles. On that very same day, respondent alleges that it paid the letter of credit to the Turkish Bank, but that it did so prior to receiving notice of Justice Rehnquist's order. This question remains an extremely viable one which may not so easily be resolved by Crocker's rather casual and cavalier position.

It remains to be determined whether Crocker's knowledge of petitioners' application before Justice Rehnquist constitutes sufficient notice OR whether Crocker did, in fact, pay prior to notice OR whether the payment process had, in fact, been completed prior to notice OR whether Crocker had the ability to reverse or cancel what it had done to the point when it did receive notice. After all, as pointed out hereinabove, there is a ten-hour time difference between California and Turkey.

In addition to the above, the second question presented by petitioners, whether 12 U.S.C. 91 immunizes a national bank from responsibility for knowingly aiding or abetting others in the violation of a preliminary injunction issued prior to final judgment, is most certainly not moot.

Regardless of whether the injunction was properly dissolved as to Crocker or whether Crocker paid prior to notice of Justice Rehnquist's stay order, the injunction remained in effect as to all other defendants. Only the Turkish Bank (Turkiye Is Bankasi AS)

quashed service of the summons and complaint. However, it did not move to vacate or quash the injunction against it. There is much authority for the proposition that, in a situation such as this, the injunction against the Turkish Bank remained in effect. Included among this authority is *Ex Parte Lennon*, 166 U.S. 548, 554 (1897), in which the United States Supreme Court held:

The fact that petitioner was not a party to such suit, nor served with process of subpoena, nor had notice of the application made by complainant for the mandatory injunction, nor was served by the officers of the court with such injunction, are immaterial, so long as it was made to appear that he had notice of the issuing of an injunction by the court. To render a person amenable to an injunction it is neither necessary that he should have been a party to the suit in which the injunction was issued, nor to have been actually served with a copy of it, so long as he appears to have had actual notice.

Based on the developments of this case and the record before this court, all issues remain viable and a true case or controversy remains.

Conclusion.

In conclusion, petitioners would respectfully make reference to *Third National Bank in Nashville v. Impac Limited, Inc.*, 97 S.Ct. 2307 (1977), a decision that respondent suggests at page 12 of its brief in opposition, "That petitioners apparently regarded as irrelevant to this case, since they nowhere relied upon or even cited it in their petition."

With sincere apologies to this Court, the instant petition for a writ of certiorari was written in August, 1977 and filed on August 23, 1977. Unfortunately, petitioners did not yet have knowledge of the *Third National Bank in Nashville* case as the decision was handed down in June, 1977. However, the *Third National Bank in Nashville* case was relied upon by petitioners in its application for a stay presented to Justice Rehnquist on October 24, 1977 and it is the position of the petitioners that this case clearly holds that 12 U.S.C. 91 does not preclude a state court from issuing an injunction against a national bank prior to final judgment in a case such as that now before this court. For all of the reasons set forth herein and in its petition for a writ of certiorari, petitioners respectfully pray that their petition be granted.

DATED: November 16, 1977.

Respectfully submitted,

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